SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2019 - 2020 Regular

Bill No:	AB 2512	**Hearing Date:**	July 31, 2020
Author:	Mark Stone		
Version:	June 8, 2020		
Urgency:	No	**Fiscal:**	No
Consultant:	MK		

Subject: ***Death Penalty: Person With an Intellectual Disability***

HISTORY

Source: California's Anti-Death Penalty Coalition

Prior Legislation: SB 1381 (Pavley) Chapter 457, Stats.
SB 3 (Burton) Chapter 700, Stats. 2003
SB 51 (Morrow) 2003, Failed Senate Public Safety
AB 557 (Aroner) 2002; failed on Assembly Concurrence
AB 1512 (Aroner) 2001; not heard in Assembly Appropriations
AB 1455 (Isenberg) 1993-94; failed Assembly Floor

Support: 8th Amendment Project; Alameda County Public Defender's Office; American Civil Liberties Union of California; Asian Americans Advancing Justice – California; California Attorneys for Criminal Justice; California Catholic Conference; California Coalition for Women Prisoners; California Pan-Ethnic Health Network; California Public Defenders Association; Californians for Safety and Justice; Californians United for A Responsible Budget; Disability Rights California; Drug Policy Alliance; Ella Baker Center for Human Right; Equal Justice USA; Friends Committee on Legislation of California; Initiate Justice; John M. Langston Bar Association; League of Women Voters of California; National Association of Social Workers, California Chapter; Nextgen California; Restore Justice; San Francisco Public Defender; Showing Up for Racial Justice (SURJ) Bay Area; State Council on Developmental Disabilities; The Arc and United Cerebral Palsy California Collaboration

Opposition: California District Attorneys Association

Assembly Floor Vote: 57 - 0

PURPOSE

The purpose of this bill is to authorize a defendant in a death penalty case to apply for an order directing that a hearing to determine intellectual disability be conducted as part of a habeas corpus petition, and revises the definition of intellectual disability

Existing law establishes court procedures during death penalty cases regarding the issue of intellectual disability. (Penal Code § 1376.)

Existing law defines "intellectual disability" as the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before 18 years of age. (Penal Code § 1376 (a).)

Existing law authorizes a defendant to apply, prior to the commencement of trial, for an order directing that a hearing to determine intellectual disability be conducted when the prosecution in a criminal case seeks the death penalty. (Penal Code § 1376 (b)(1).)

Existing law requires the court to order a hearing to determine whether the defendant has an intellectual disability upon the submission of a declaration by a qualified expert stating the expert's opinion that the defendant is a person with an intellectual disability. (Penal Code § 1376 (b)(1).)

Existing law states that the defendant's request for a court hearing prior to trial constitutes a waiver of jury hearing on the issue of intellectual disability. (Penal Code § 1376 (b)(1).)

Existing law provides that if the defendant does not request a court hearing, the court shall order a jury hearing to determine if the defendant is a person with an intellectual disability. (Penal Code § 1376 (b)(1).)

Existing law specifies that the jury hearing on intellectual disability shall occur at the conclusion of the guilt phase of the trial in which the jury has found the defendant guilty with a finding that one or more special circumstances, as specified, are true, making the penalty death or life imprisonment without possibility of parole (LWOP). (Penal Code, §§ 190.2; 1376 . (b)(1).)

Existing law provides that the jury or court shall decide only the question of the defendant's intellectual disability. The defendant shall present evidence in support of the claim that they are a person with an intellectual disability. The prosecution shall present its case regarding the issue of whether the defendant is a person with an intellectual disability. Each party may offer rebuttal evidence. The court, for good cause in furtherance of justice, may permit either party to reopen its case to present evidence in support of or opposition to the claim of intellectual disability. The court may make orders reasonably necessary to ensure the production of evidence sufficient to determine whether or not the defendant is a person with an intellectual disability, including, but not limited to, the appointment of, and examination of the defendant by, qualified experts. A statement made by the defendant during an examination ordered by the court shall not be admissible in the trial on the defendant's guilt. (Penal Code § 1376 (b)(2).)

Existing law provides that the burden of proof shall be on the defendant to prove by a preponderance of the evidence that they are a person with an intellectual disability. The jury verdict must be unanimous. (Penal Code § 1376 (b)(3).)

Existing law provides that where the hearing is conducted before trial, the following shall apply:

- If the court finds that the defendant is a person with an intellectual disability, the court shall preclude the death penalty and the criminal trial shall proceed as in any other case in which a sentence of death is not sought by the prosecution. If the defendant is found

guilty of first degree murder, with a true finding of one or more special circumstances, the court shall sentence the defendant to confinement in the state prison for LWOP. The jury shall not be informed of the prior proceedings or the finding concerning the defendant's claim of intellectual disability. (Penal Code § 1376 (c)(1).)

- If the court finds that the defendant is not a person with an intellectual disability, the trial court shall proceed as in any other case in which a sentence of death is sought by the prosecution. The jury shall not be informed of the prior proceedings or the finding concerning the defendant's claim of intellectual disability. (Penal Code § 1376 (c)(2).)

Existing law provides that when the hearing is conducted before the jury after the defendant is found guilty with a finding that one or more special circumstances is true, the following shall apply (Penal Code § 1376 (d)):

- If the jury finds that the defendant is a person with an intellectual disability, the court shall preclude the death penalty and sentence the defendant to confinement in the state prison for LWOP; or

- If the jury finds that the defendant does not have an intellectual disability, the trial shall proceed as in any other case in which the death penalty is sought by the prosecution.

Existing law states that in any case in which the defendant has not requested a court hearing prior to trial, and has entered a plea of not guilty by reason of insanity, as specified, the hearing on intellectual disability shall occur at the conclusion of the sanity trial if the defendant is found sane. (Penal Code, § 1376 (e).)

Existing law allows a person who is unlawfully imprisoned or restrained of his or her liberty to prosecute a writ of habeas corpus to inquire into the cause of his or her imprisonment or restraint. (Penal Code § 1473 (a).)

Existing law states that a writ of habeas corpus may be prosecuted for, but not limited to, the following reasons (Penal Code § 1473 (b)):

- False evidence that is substantially material or probative on the issue of guilt, or punishment was introduced against a person at any hearing or trial relating to his incarceration; or

- False physical evidence believed by a person to be factual, material or probative on the issue of guilt, which was known by the person at the time of entering a plea of guilty and which was a material factor directly related to the plea of guilty by the person; or

- New evidence exists that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial. Specifies that “new evidence” means evidence that has been discovered after trial, that could not have been discovered prior to trial by the exercise of due diligence, and is admissible and not merely cumulative, corroborative, collateral, or impeaching.

Existing law provides that a writ of habeas corpus may also be prosecuted on the basis that evidence relating to intimate partner battering and its effects, as defined, was not introduced at the trial relating to the prisoner's incarceration for a conviction of a violent felony, as defined, and had such substantial and competent expert evidence been introduced, there is a reasonable probability, sufficient to undermine confidence in the judgment of conviction or sentence, that the result of the proceedings would have been different. (Penal Code, § 1473.5 (a), (b), (c).)

Existing law specifies that habeas corpus is the exclusive procedure for collateral attack on a judgment of death. (Penal Code § 1509.)

This bill states, in uncodified language, that the United States Supreme Court has recognized that it is unconstitutional to execute a person with an intellectual disability and that it is the intent of the Legislature that California adopt the professional medical community's definition and understanding of intellectual disability. It is the further intent of the Legislature that individuals with intellectual disabilities be accurately and quickly identified to avoid protracted and unnecessary litigation.

This bill revises the definition of "intellectual disability", for the purposes of a case in which the death penalty is charged, to mean the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the end of the developmental period, as defined by clinical standards.

This bill defines "prima facie showing of intellectual disability" to mean that the defendant's allegation of intellectual disability is based on the type of evidence typically relied on by a qualified expert in diagnosing intellectual disability, as defined in current clinical standards, or when an expert provides a declaration diagnosing the defendant as intellectually disabled.

This bill requires the court to order a hearing to determine whether the defendant is a person with an intellectual disability upon a prima facie showing, as defined.

This bill authorizes a defendant to apply for an order directing that a hearing to determine intellectual disability be conducted as part of a petition for a writ of habeas corpus.

This bill provides that when the claim of intellectual disability is raised in a petition for habeas corpus, and a petitioner makes a prima facie showing of intellectual disability, the reviewing court shall issue an order to show cause if the defendant has met the prima facie standard.

This bill specifies that the petitioner bears the burden of proving by a preponderance of the evidence that the petitioner is a person with an intellectual disability.

This bill provides that the respondent may present the case regarding the issue of whether the defendant is a person with an intellectual disability. Each party may offer rebuttal evidence.

This bill provides that during an evidentiary hearing under the habeas corpus provisions, an expert may testify about the contents of out-of-court statements, including documentary evidence and statements from witnesses when those types of statements are accepted by the medical community as relevant to a diagnosis of intellectual disability if the expert relied upon these statements as the basis for their opinion.

This bill prohibits changing or adjusting the results of a test measuring intellectual functioning based on race, ethnicity, national origin, or socioeconomic status.

COMMENTS

1. Need for This Bill

According to the author:

> This bill will bring statute up-to-date with clinical standards by requiring that evidence of an intellectual disability present "during the developmental period" rather than "before age 18." AB 2512 will also prohibit prosecutors from making arguments based on race, ethnicity, socioeconomic status, or national origin to increase IQ scores to keep people on death row. Additionally, the bill will allow a person to establish a prima facie case that they have an intellectual disability by using the kind if evidence relied on by a qualified expert and will clarify that experts are allowed to testify to out-of-court statements that they used in forming their opinion in post-conviction proceedings.

2. *Atkins v. Virginia*

In *Atkins v. Virginia* (2002) 536 U.S. 304, 321 (*Atkins*), the United States Supreme Court held that the Eighth Amendment forbids the execution of an intellectually disabled defendant. It is cruel and unusual punishment to impose the death penalty on a defendant with intellectual disability, then referred to as "mentally retarded." (*Atkins, supra*, 536 U.S. at p. 321; *Hall v. Florida* (2014) 572 U.S. 701.) "No legitimate penological purpose is served by executing the intellectually disabled." (*Hall v. Florida, supra*, 572 U.S. at p. 708, citing *Atkins, supra*, 536 U.S. at p. 320.)

In defining intellectual disability, the *Atkins* court referenced two clinical definitions:

> The American Association on Mental Retardation (AAMR) [now the American Association of Intellectual and Developmental Disabilities (AAIDD)] defines mental retardation as follows: 'Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.' [Citation.] [¶] The American Psychiatric Association's definition is similar: 'The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.' [Citation.] 'Mild' mental retardation is typically used to describe people with an IQ level of 50–55 to

> approximately 70. [Citation.] (*Atkins, supra*, 536 U.S. at p. 308, fn. 3.) *Atkins* left it up to the states to "'develop[] appropriate ways'" to ensure that intellectually disabled defendants are not sentenced to death. (*Id*. at p. 317.)

In response to *Atkins*, the California Legislature enacted Penal Code section 1376. (*In re Hawthorne* (2005) 35 Cal.4th 40, 44.) Section 1376 defines intellectual disability, formerly "mental retardation," as "the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before 18 years of age." (Pen. Code, § 1376, subd. (a); see Stats. 2012, Chapter 448 [the Shriver "R-Word" Act, which revised various statutes to replace references to "mental retardation" with the term "intellectual disability"], 457 [similarly replacing references to "mental retardation"].).)

3. Intellectual Disability Required Onset Before Age 18

Intellectual disability, prohibiting capital punishment, is defined in Penal Code section 1376 as manifesting before age 18. (Pen. Code, § 1376, subd. (a).) The statute contains no provision for any intellectual disability of a defendant that did not manifest before age 18. (Pen. Code, § 1376.)

The Legislature derived this standard from the two clinical definitions referenced by the high court in *Atkins, supra*, 536 U.S. at page 309, footnote 3. (*In re Hawthorne* (2005) 35 Cal.4th 40, 47-48.) However, one of the standards has since changed:

> Intellectual disability has long been categorized as a developmental condition with an onset prior to the end of the developmental period. Although U.S. federal law (Developmental Disabilities Act of 2000; PL 106-402) has defined the end of the developmental period to be age 22 years for developmental disabilities, the end of the developmental period for intellectual disability had historically been set at age 18 years (see: Schalock et al., 2010; American Psychiatric Association, 2000). In its most recent revision of the Diagnostic and Statistical Manual for Mental Disorders, the American Psychiatric Association has left the chronological age of cut-off defining the "developmental period" up to the clinician and their clinical judgement (see: American Psychiatric Association, 2013).

< https://www.apa.org/pi/disability/resources/publications/newsletter/2016/09/intellectual-disability > [as of March 31, 2020].)

This bill would update the definition of "intellectual disability" to include conditions that manifest before the end of the developmental period, as defined by clinical standards.

4. Practice of Adjusting IQ Scores Based on Race

Penal Code section 1376 does not contain any IQ requirement, as has been barred by the United States Supreme Court. (*Hall v. Florida, supra*, 572 U.S. at p. 724.) The Court stated, "When a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." (*Id* at p. 723.) Thus, while not necessarily conclusive, IQ continues to play a major role.

"Here's where 'ethnic adjustments' come in. The practice, as documented by attorney Robert Sanger in a 2015 article in the *American University Law Review*, adjusts IQ scores upward for people of color convicted of capital crimes. According to Sanger, prosecutors in Florida, Texas, Alabama, Tennessee, Missouri, California, Pennsylvania, and Ohio have all used ethnic adjustments to successfully impose the death penalty on people who otherwise might have been deemed exempt. In his article, Sanger works methodically through case after case, noting in particular the role played by expert witnesses for the prosecution, who testify to the racial biases of IQ testing. In most cases, these experts have never met the person convicted of the capital crime or assessed that person for disability, even as their testimony clears the way for execution." (< https://psmag.com/social-justice/how-iq-tests-are-perverted-to-justify-the-death-penalty > [as of March 31, 2020].)

In the article, Sanger concludes that, viewed objectively, "the practice of 'ethnic adjustments' does not survive strict logical, clinical, or constitutional scrutiny." (Robert Sanger, *IQ, Intelligence Tests, 'Ethnic Adjustments' and Atkins* (Oct. 2015) American University Law Review, Vol. 65, at p. 148 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2706800 > [as of March 31, 2020].) "By any objective reading of the extensive case law from the U.S. Supreme Court, 'ethnic adjustments,' which qualify people of color for the death penalty by adjusting scores based solely on their race, are unconstitutional under the Equal Protection Clause of the Fourteenth Amendment." (*Ibid*.)

This bill would prohibit "ethnic adjustments" of IQ scores.

5. Requirement of an Expert Declaration

Once a defendant submits an expert declaration opining that the defendant is a person with an intellectual disability, the court must order a hearing to determine the issue. (Pen. Code, § 1376, subd. (b)(1).). This bill would loosen the requirement. The defendant would instead be required to make a "prima facie showing of intellectual disability." This could be based on either [1] an expert declaration diagnosing the defendant as intellectually disabled or [2] the type of evidence typically relied on by a qualified expert in diagnosing intellectual disability, as defined in current clinical standards.

6. Post-Conviction Proceedings

The California Supreme Court has provided guidance on how a defendant may pursue a post-conviction claim of intellectual disability. The claim should be raised by a petition for writ of habeas corpus. (See *In re Hawthorne* (2005) 35 Cal.4th 40, 47.)

Though by its terms, the standards and procedures set forth in Penal Code section 1376 apply only to pre-conviction proceedings, our state High Court has concluded that post-conviction proceedings should "track[] section 1376 as closely as logic and practicality permit…." (*In re Hawthorne, supra,* 35 Cal.4th at p. 47.) This is warranted "both to maintain consistency with our own legislation and the judicial frameworks adopted in other jurisdictions and to avoid due process and equal protection implications. (*Ibid*.)

This bill would codify post-conviction relief for claims of intellectual disability via a petition for writ of habeas corpus. This bill would also codify a hearsay exception in post-conviction proceedings, allowing experts on intellectual disability to testify to out-of-court statements that

they used in forming their opinion. (See *post*, Expert Testimony Based on Out-of-Court Statements in Post-Conviction Proceedings.)

The bill contains no similar hearsay provision for pre-conviction proceedings. (*In re Hawthorne, supra,* 35 Cal.4th at p. 47.) According to proponents of this bill, the use of hearsay statements is necessary in post-conviction proceedings due to the length of time it takes to litigate a death penalty claim, and the possible unavailability of witnesses of the defendant's early childhood behavior on which an expert may have relied in forming an opinion.

7. Expert Testimony Based on Out-of-Court Statements in Post-Conviction Proceedings

The Evidence Code prohibits, except as provided by law, the admission of hearsay, which is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subds. (a), (b).)

In *Sanchez*, the California Supreme Court clarified the evidentiary rules applicable to expert witnesses who rely on hearsay for purposes of their expert opinions. The court explained that an expert cannot "relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*People v. Sanchez* (2016) 63 Cal.4th 665, 686.) Further, in cases where the Sixth Amendment applies, there is a confrontation clause violation when a prosecution expert seeks to relate testimonial hearsay. (*Ibid*.)

Medical diagnoses based on reported symptoms were recognized as a hearsay exception even at common law. (*Sanchez, supra*, 63 Cal.4th at p. 678.) Under the Evidence Code, medical and hospital records, if properly authenticated, may also fall within the business records exception. (Evid. Code, §§ 1271, 1560, 1561, 1562; see *Sanchez, supra,* 63 Cal.4th at p. 675 [medical records and patient's statements may qualify for hearsay exceptions].)

This bill would clarify that the common law hearsay exception for medical diagnoses extends to intellectual disability diagnoses in post-conviction capital cases; it would codify an exception allowing experts to testify to out-of-court statements on which they relied for their intellectual disability diagnosis. This could include the expert's review of records, interviews, etc. (<https://www.apa.org/pi/disability/resources/publications/newsletter/2016/09/intellectual-disability >[as of April 30, 2020].)

8. Argument in Support

According to the sponsor, the California's Anti-Death Penalty Coalition:

> The US Supreme Court ruled that it is unconstitutional to execute someone with an intellectual disability in 2002.1 The following year, the California Legislature added Penal Code section 1376 to implement this decision.2 Since it was enacted, this code section has only been amended once, in 2012, to change the term "mental retardation" to "intellectual disability."3 The statute is now out-of-date and as a result, people with intellectual disabilities continue to face death sentences and remain on death row for decades.

9. Argument Opposition

According to the California District Attorneys Association:

> On behalf of the California District Attorneys Association I regret to inform you that we are opposed to your Assembly Bill 2512 which would change the definition of intellectual disability from the current definition which requires the condition to manifest itself before the age of 18 to a condition which manifests itself before the end of the developmental period as defined by clinical standards.
>
> AB 2512 was reviewed by the Capital Litigation Committee of CDAA which noted that the bill is unnecessary as current law protects all capital defendants under *Atkins* (*Atkins v. Virginia* 56 U.S. 304). Moreover, the bill would create a vague and prejudicial loophole that would result in a miscarriage of justice for all murder victims and their loved ones.
> When a person is born with an intellectual disability, it is clear and unambiguous. Reputable mental health experts and clinicians agree that this intellectual disability manifests itself well before the age of 18.

-- END –